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October 18, 2021

James Boyd
Coastal Resources Management Council
Stedman Government Center
4808 Tower Hill Road
Wakefield, RI 02879

Re: Comments on Rules and Regulations Governing the Protection and Management of Freshwater Wetlands in the Vicinity of the Coast

Dear Mr. Boyd,

Thank you for the opportunity to comment on the most recent draft of the Rules and Regulations Governing the Protection and Management of Freshwater Wetlands in the Vicinity of the Coast. My comments are on behalf of Save The Bay.

As you know, the Wetlands Legislative Task Force was convened in 2013 to make recommendations for adequate wetland protections based on review of the best available scientific work. In general, the findings concluded that for sediment and phosphorus removal a wetland buffer between 30 and 100 feet is adequate. For nitrogen removal, a buffer between 100 to 160 feet is adequate. Numerous studies recommend a minimum buffer width of 100 feet for protective water quality purposes, although even this number is considered conservative, since conditions vary from site to site. When it comes to providing habitat, the Legislative Task Force found that in order for a wetland to offer excellent wildlife habitat for general species, a buffer of almost 2,000 feet is required. For good wildlife habitat a buffer that is at least 328 feet is required. For fair wildlife habitat a buffer of at least 250 feet is required. It takes a lot of forest to adequately shield wildlife in a wetland from human impacts.

The Freshwater Wetlands Act and the Rules are intended to preserve, protect, and restore the purity and integrity of all freshwater wetlands in the state of Rhode Island so that these wetlands shall be available for all beneficial purposes. Freshwater wetlands in the Narragansett Bay watershed provide essential water quality benefits and their health and resiliency directly affect Narragansett Bay. The revisions passed in 2015 to the Freshwater Wetlands Act (the Act) were a compromise between those seeking to develop land and those seeking to protect freshwater wetlands; the law does not fully embrace accepted science and protect all functions and values of wetlands in all cases. In the proposed 2020/2021 Freshwater Wetlands Regulations (the Regulations), CRMC is not exercising the limited authority it was given in 2015 to review alterations within 100 feet of land surrounding freshwater wetlands and 200 feet around rivers and streams. In

SaveThe Bay (sāv the bā) **noun.** advocate, watchdog, steward, educator, voice for Narragansett Bay. **verb.** defend, lead, protect, improve, teach. **adj.** nimble, passionate, steadfast, inspiring, effective.

summary, we object to the Regulations as they do not further CRMC's duty reinforced by legislative findings, to preserve the integrity of freshwater wetlands or fulfill CRMC's mission to "preserve, protect, develop, and where possible, restore the coastal resources of the state for this and succeeding generations".

2.2 Administrative Findings

2.2 (B)(4) "The cumulative impact of incremental alterations to freshwater wetlands, buffers and floodplains that occur at different times or in different locations within the same system, or both, may constitute a significant alteration, even if a single proposed alteration may not in and of itself constitute a significant alteration." We acknowledge that cumulative impacts are difficult to measure and crucial to determine. However, the Regulations do not have criteria for how cumulative impacts are evaluated and as a result wetland systems are subject to water quality impairments and habitat loss through overdevelopment. The Council should enumerate the criteria it will use to evaluate cumulative impacts.

2.4 Definitions

2.4 (A)(4) Expand the definition of "alter" and "alteration" to include compacting soil within, digging, rutting, and other alterations associated with off-road vehicle use within freshwater wetland, buffer, floodplain, area subject to flooding (ASF), and area subject to storm flow (ASSF). This type of use or activity within a wetland is incredibly destructive and should be included in the definition.

2.4 (A)(10) Please clarify the definition of buffer to specifically include restored buffer in the definition.

2.5 Applicability and Regulated Activities

2.5 (B)(3) Non wetlands: Concrete or poly lined ponds are heavily altered wetland areas, however in some cases are wetlands, especially if they were historic wetlands that were altered. We support, however, including man-made gardens and ornamental fish ponds that are outside of all wetland areas, that were not constructed in any historical wetland area, within a category of "nonwetland", as described below in section 2.5(B)(6).

2.5.3 (B) Freshwater Wetland in the Vicinity of the Coast: It is not clear what a "watershed activity" is. The terms should be defined and the larger buffers and setbacks should be established for the Special Area Management Plans in this section.

2.5.5 Prohibitions (A) Include "operate motor vehicles within" in the prohibitions section.

2.5.6 (B)(1) Section 2.5.6 (B) establishes that RIDEM or The Council has regulatory authority over projects that "are proposed outside of a jurisdictional area which in all likelihood, because of their close proximity to freshwater wetlands or buffers, or because the size or nature of the project or activity will result in an

alteration of the natural character of any freshwater wetland or buffer”. However, Section 2.5.6 (B)(1) states that “For any such project or activity that involves land disturbance of one (1) acre or more of land area, approval may be obtained under [RIDEM’s] General Permit for Stormwater Discharge Associated with Construction Activity *without a separate application*” (emphasis added). We are concerned that this change will remove review by wetland biologists for large projects that have indirect wetland alterations. Staff in the Office of Water Resources that are reviewing large projects should consult with CRMC staff during review to avoid unnecessary alterations to wetlands and buffers.

2.6 Exempt Activities

2.6.3 (A)(2) Replacement of culverts: Remove sections 2.6.3 (A)(2)(a) through (d) from exempt activities. Municipalities routinely replace poorly functioning road stream crossings to avoid permitting. The “replacement in kind” exemption encourages improperly sized culverts to be replaced and not redesigned to address flooding, climate resilience and wildlife movement.

2.6.5 (A) Exemptions for single family residences and accessory structures: In the current Rules, this exemption does not allow for any alteration within the full perimeter wetland associated with a bog, which is the maximum jurisdictional area associated with this very rare and valuable wetland type. The last portion of this section should be changed to read: “...is at least 50 feet from any flowing body of water or vernal pool, and is at least 100 feet from any bog or rare wetland type as defined in 2.4 (A)(57).”

2.6.5 (A)(8) Replace the text “Other accessory structures” with “Stormwater management features” for clarity.

2.6.6 (A) Exemptions for non-residential buildings or multi-family residences and accessory structures: In the current Rules, this exemption does not allow for any alteration within the full perimeter wetland associated with a bog, which is the maximum jurisdictional area associated with this very rare and valuable wetland type. The last portion of this section should be changed to read: “...is at least 50 feet from any flowing body of water or vernal pool, and is at least 100 feet from any bog or rare wetland type as defined in 2.4 (A)(57).”

2.6.15 Specify that public events or festivals within wetlands and buffers must minimize noise and light disturbances after dusk and before dawn, and place a time limitation for this exemption of no more than one week or seven consecutive days.

2.6.18 (A)(2) Restoration Planting Projects: Clearing an area “not to exceed a radius that is twice the diameter of the rootball” is an unrealistic area within which to clear invasive vegetation. Please change this to read “not to exceed a radius of five feet”. This is to ensure non-native invasive species do not completely overwhelm small plantings during the first few growing seasons.

2.6.18 (A)(8) Restrictions on soil disturbances only appear in the Restoration Planting section of the exempt activities. We ask you to include time of year soil disturbance restrictions for turtle nesting for *all exempt and permitted activities* that may result in soil disturbance.

2.7.1 Freshwater Wetlands and Buffer Protection Standards

2.7.1 (B)(3) Freshwater Wetlands Buffer Standard: Given the above-noted shortcomings of the jurisdictional area in protecting all functions and values of wetlands, most notably nitrogen removal and wildlife habitat, it is imperative that “all projects and activities shall be designed and carried out to avoid alteration of the buffer [remove buffer zones].” Projects should be designed to avoid wetland alterations, and therefore buffer alterations, to the maximum extent.

2.7.1 (B)(4)(a) Creation of New Buffer on Existing Disturbed Property: Change “may be required” to “shall be required.” Buffer restoration is far less likely to happen unless it is a requirement.

2.7.1 (B)(4)(b)(2)(AA) The 25’ buffer target for River Protection Regions 1 and 2 is not based on the findings of the Wetlands Legislative Task Force. If there is room on a parcel for more buffer protection or creation then the Council should require it.

2.7.1 (B)(4)(c) Consider management requirements for creation of new buffers to avoid proliferation of non-native invasive species. Also consider incorporating other elements of a buffer into the restoration other than trees (leaf litter, shubs, saplings, woody debris). Specify that created buffers must not be mown, mulched, trimmed, raked, or otherwise maintained other than for exclusion of invasive non native species.

2.7.1 (B)(5)(a)(3) Residential Infill Lot Buffer Standard: One acre is too large for a residential infill lot buffer standard. 25,000 square feet, or approximately half an acre, is more appropriate as the maximum size lot that should use this rule. This section should not be extended to include lots that only have development on one side.

2.7.1 (C)(1) Setback Standards: The current Coastal Resources Management Council’s setback standard is 25 feet. The proposed setback should be increased to 25 feet to be consistent. . Accessory structures should have a setback distance of no less than the buffer plus 10 feet, so as to be consistent with current freshwater wetland review policy.

2.7.3 Variances from Standards Applicable to Regulated Projects and Activities

The title should be changed to “Variances from Standards Applicable to Freshwater Wetland Permits”. This is to clarify that the variance section does not apply to Applications to Alter Freshwater Wetlands.

Rule 2.7.3 fails to clearly incorporate two key threshold findings upon which most environmental regulatory variance are based. We suggest the following changes:

(1) The applicant must show that the proposed alteration will not result in significant adverse impacts to wetlands (See, for ex.; CRMC Rule 1.1.7 (A)(2) “The proposed alteration will not result in significant adverse environmental impacts or use conflicts, including but not limited to, taking into account cumulative impacts”). Rule 2.7.3 does not base its variance procedures and criteria on this threshold finding; and

(2) References to Rule 2.7.1 D-F should be eliminated from Rule 2.7.3. A.1.

The inclusion of Review Criteria D, E and F as eligible for a variance appears to conflict with controlling laws. The standards where a variance is available include; Rule 2.7.1 (D) projects in wetland habitat of rare and endangered species; Rule 2.7.1 (E) projects in wetland (floodplain) areas important to flood storage capacity; and Rule 2.7.1 (F) projects in wetlands that might impact flow of groundwater, surface water, and again, impacting flood storage capacity.

Projects that “may reduce the ability of a freshwater wetlands or buffer to ensure the long-term viability of any rare or endangered animal or plant species” are projects that may negatively impact “critical habitat” of species included by the federal Endangered Species Act (as referenced and included in the proposed Rule 2.7.1 (D)). “Critical habitat” for any threatened or endangered species is habitat that is “essential to the conservation” of the species and may also include habitat that the species requires for recovery or “special management.” 16 U.S. Code § 1532 (5)(A). It does not appear that CRMC can offer a regulatory variance from federal law protecting such habitat.

Projects proposed in floodplains or impacting a wetland’s ability for flood storage capacity presents additional legal and practical challenges. First, R. I. Gen. Laws § 45-61-2 makes the consistent application of RI’s stormwater design and installation standards manual a paramount public policy, recognizing that “that stormwater, when not properly controlled and treated, causes pollution of the waters of the state, threatens public health, and damages property.” R. I. Gen. Laws § 45-61-2 (1). Variances granted to projects that may negatively impact the ability of wetlands to store and meter out the impacts of flooding are counter to that stated policy. It may also be counter to the federal delegation of stormwater management to RIDEM and CRMC under the Clean Water Act. Rule 2.7.3 does not include a variance opportunity to allow for non-compliance with the manual per se, but by allowing variances for projects that may negatively impact the ability of wetlands to store and meter out the impacts of flooding it may run counter to the standards contained in the stormwater manual as well as the Clean Water Act, and RI’s Water Quality law and regulations.

Also, importantly, inclusion of such projects directly conflicts with numerous stated public policies centered on the protection of the state’s economic well-being as well as the protection of public safety generally. These include legislative findings that wetlands “provide storage and absorption areas for flood waters which reduce flood hazards,” that “flood waters overflowing into freshwater wetlands, buffers, floodplains, and other areas that may be subject to storm flows and flooding are not only released more slowly downstream, thus reducing the damage they may cause, but flood waters may be absorbed into the ground water supply further reducing the flood hazard and recharging the vital ground water resource,” and “freshwater wetlands, buffers, and floodplains, are increasingly threatened by random and frequently undesirable projects for drainage, excavation, filling, encroachment, or other forms of disturbance or destruction, and that a review of scientific literature indicates that aspects of existing state standards to protect these areas need to be

strengthened” specifically. R.I. Gen. Laws §2-1-18. A project’s adherence to, and municipal enforcement of RI’s stormwater design and installation standards manual is not a substitute for RI law’s requirement that RIDEM and CRMC protect against the erosion of RI wetlands’ ability to store and meter out the damaging impacts of storms and flooding events which continue to pose increased threats to RI’s public safety and welfare due to climate change. The Freshwater Wetlands Act and the Rules are intended to preserve, protect, and restore the purity and integrity of all freshwater wetlands in the state of Rhode Island so that these wetlands shall be available for all beneficial purposes.

2.7.3 (C) Alternative Configuration of Vernal Pool Buffer Zone: This variance weakens the buffer zone for vernal pools. Arguably the primary function of this wetland type is wildlife habitat; maximizing the buffer and/or requiring additional protection is critical for projects to avoid a significant alteration of these wetland types. You are undoubtedly aware of the science which suggests that a 100 foot buffer around an isolated vernal pool is not sufficient to sustain a healthy population of those species that depend on that pool for breeding. The variable width buffer zone for vernal pools is not protective. In areas where more development is present around the vernal pool, a larger buffer is required, not a smaller buffer. It would be more protective to implement a vegetated wildlife travel corridor connecting vernal pools to remaining undeveloped habitat. We ask that this section be removed from the Rules to better allow reviewing biologists to recommend layouts that minimize alterations to the maximum extent possible.

2.8 Application Types and General Application Requirements

2.8.7 (D)(4) Applicants should be required [instead of strongly advised] to retain the services of qualified professionals for (1) identification and delineation of wetland edges, (2) Evaluation of freshwater wetland functions, values, and impacts, and (3) General Permit application.

2.8.11 (D) Written comments from municipalities should be treated as substantive comments as municipalities have lost much of their wetland oversight.

2.10 General Permits

While we understand that there are no general permit categories yet, we see a significant need for transparent, streamlined and expedited permitting process for wetland restoration projects involving culvert removal for the purpose of daylighting streams, improving passage for aquatic organisms, and/or removal of fill, and invasive plant removal.

2.10 (B) General Permit Application: We recommend that Applications for a Freshwater Wetlands General Permits require an appropriately trained wetland professional to inspect the property, properly identify wetland resources, and prepare the application.

2.23 Statewide Buffer Zone Descriptions

2.23 (B)(1) Buffer zones in non-urban River Protection Region 1 and River Protection Region 2, which you acknowledge, include “watershed areas that are high priorities for conservation of fish and wildlife habitat and rivers which rank highest on a Rhode Island stream condition index” should extend across the full jurisdictional area. Based on the literature review for buffers as they relate to wildlife habitat, full protection of the jurisdictional area will only result in poor to fair protection of these functions and values at best, so there is no justification for further reducing them.

2.23 (F)(2) specifies that an additional 25 feet will be added to the buffer zone width when multiple differing wetland types are present within the overall wetland. Remove the condition that the additional buffer zone will be added when one or more differing freshwater wetland types are present within fifty feet of the inward wetland edge. Wetland complexes are inherently more diverse and have more functions and values than non-wetlands complexes. The location of the second wetland type within the larger type does not devalue this.

2.23 (H): Designated Buffer Zones in the non-urban River Protection Region 1 and River Protection Region 2

2.23 (H)(2)(d) We are concerned that many small ponds < ¼ acre that may function as amphibian breeding areas (vernal pools) will be misidentified to take advantage of the smaller buffer zone. We recommend increasing the buffer zone for ponds of all sizes (except highway ponds) in River Protection Region 1 and Region B and clarifying small pond definition so that there is no overlap between these two wetland types.

2.23 H (2)(e) and H (3)(j): Highway ponds and highway wetlands: change the definition to specify that highway ponds and wetlands must be completely enclosed by a highway exit ramp and adjacent roadways and not simply adjacent to a highway entrance or exit ramp.

2.23 (H)(3)(i) Vernal Pools: All vernal pools must have a 100 foot buffer zone. For those pools that have less than 50% undeveloped vegetated land within 100’ of its edge eliminate the reduced buffer zone. Many vernal pool species including wood frogs, spotted salamanders, and American toads will travel long distances to find breeding habitat. It is well documented that amphibians will cross roadways, lawns, and other development in order to breed. Keeping the 100 foot buffer zone for all vernal pools will increase survivability of eggs and larvae, reduce adult mortality, and will provide the most protection under the law.

2.23 (H)(5): Rivers that are designated a 200 foot buffer zone:

Include the following watercourses to this section:

- Hunt River (East Greenwich, North Kingstown, RP Region 2)
- All branches of the Pawtuxet River

2.23 (I): Designated Buffer Zones in the Urban Region

2.23 (I)(2) Urban Ponds: Designating a 25 foot buffer for all urban ponds other than the 15 ponds listed equates them in function and value to highway wetlands, which is completely unacceptable and is not protective of basic water quality. Many of the urban ponds in this category have water quality impairments, and are located in underserved communities. A reduction in regulated buffer will make improving water quality in these ponds unobtainable, and sends the message that the Council values these wetland areas less.

2.23 (I)(4) Urban Rivers with 150 foot Buffer Zones:

Increase the buffer zone for all sections of the Blackstone River and the South Branch of the Pawtuxet River to 200 feet.

2.23 (I)(5) Urban Rivers with 100 foot Buffer Zones:

- Increase Buckeye Brook's buffer zone from 100 feet to 150 feet in Warwick
- Increase the Pawcatuck River in Westerly's buffer zone from 100 feet to 200 feet. This is Rhode Island's only federally designated Wild and Scenic river and it requires the maximum jurisdiction.
- Increase the Runnins River in East Providence from 100 feet to 150 feet.
- Increase the Ten Mile River's buffer zone from 100 feet to 150 feet.
- Increase the Woonasquatucket River's buffer zone from 100 feet to 200 feet.
- Increase the West River's buffer zone from 100 feet to 200 feet.

2.23 (I)(6) Urban Rivers and Streams with 50 foot Buffer Zones: It is completely unacceptable to have buffer zones for rivers that are less than 100 feet. These buffer zones are not protective of basic water quality impairments associated with stormwater. Additionally, we are greatly concerned that a reduction in buffer zone for rivers and streams in urban areas to a width of 50 feet is inadequate to protect the public health of vulnerable populations living in urban areas.

The Rhode Island Department of Health has made some findings with respect to the importance of our human environment on public health. Underserved populations across the state face ongoing environmental inequities. (<https://health.ri.gov/data/healthequity/>). We know that tree canopy and greenspace provide natural cooling within urban neighborhoods. Planting new buffers and protecting existing buffer areas will add to tree canopy and provide much needed cooling for urban environments while also benefiting water quality and public health. In July of 2020, the RI Heat Watch Campaign, a partnership of RIDOH, RIDEM, and American Forests, was launched to better understand how extreme heat disproportionately impacts communities in Rhode Island. The data collected are available on ArcGIS- Heat Watch Rhode Island and show that, along the Woonasquatucket River in Olneyville, DEM's Division of Forest Environment found significant temperature differences between Valley Street and where the Woonasquatucket River is protected by the buffer at Marino Park. On the West River, there are temperature differences between buffered and non-buffered areas of the river. Further, American Forests recently released Tree Equity Scores for Rhode Island (<https://treeequityscore.org/>). The scores are derived from an analysis that includes current tree canopy cover, unemployment, age, race, income and surface temperatures. The index is then adjusted by a neighborhood's population density and compared to surrounding neighborhoods in order to generate a Tree Equity Score of 0-100. The lowest scores show neighborhoods that need more investment in natural resources through buffer planting. Furthermore, many of Rhode Island's Environmental Justice Areas are located within CRMC wetland jurisdiction. CRMC should be increasing its authority to require plantings in urban areas, not decreasing it.

Buffers can reduce urban flooding and can improve access to physical activity when they provide spaces for recreation or nature viewing. It is understandable that where buffers are already compromised within the urban stream corridor, it may seem reasonable to lower regulatory protections. But we submit that any

remaining buffer is that much more important to the overall health of the urban ecosystem. DEM should maintain a wider buffer zone within the jurisdictional area for urban streams and mandate the preservation and creation of buffer.

Exercising jurisdiction in the urban coastal zones is critical for public health and welfare. Given increased flooding and precipitation due to climate change, it is imperative that developers be required to make improvements such as planting urban trees, improving stormwater infiltration, and implementing other measures to improve water quality to the adjacent ponds or rivers. Urban wetlands should not be sacrificed because of previous development. We acknowledge that buffer zones in urban areas may not contain the highest quality buffer, however CRMC should not toss in the towel in urban areas that serve a large population of Rhode Islanders.

In summary, Save The Bay objects to the proposed Regulations. For many wetland types, the proposed Regulations unnecessarily erode the limited protection provided by law. These Regulations should not further erode protection for wetlands by allowing development within buffers without a thorough case-by-case review by a qualified CRMC biologist. We urge you to make the necessary regulatory changes noted above to preserve the functions and values that wetlands provide for residents of all areas of Rhode Island.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kate McPherson', with a stylized flourish at the end.

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